

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

TODD M. EVCHICH,

Plaintiff,

v.

ORDER
04-CV-510S

MICHAEL SULLIVAN, ET AL.,

Defendants.

1. On July 14, 2004, Plaintiff commenced this civil rights action against Defendants under 42 U.S.C. § 1983. On February 5, 2008, Defendants filed a Motion to Dismiss for Lack of Prosecution pursuant to Rule 41 of the Federal Rules of Civil Procedure. (Docket No. 87.) This Court referred Defendants' motion to the Honorable H. Kenneth Schroeder, Jr., United States Magistrate Judge, on February 20, 2008, for the issuance of a Report and Recommendation pursuant to 28 U.S.C. § 636(b)(1)(B). (Docket No. 89.)

2. Plaintiff's deadline to respond to Defendants' motion was originally September 19, 2008. (Docket No. 95.) Judge Schroeder subsequently granted Plaintiff's motion to extend this date, and set a new deadline of October 20, 2008. (Docket Nos. 96, 97.) Plaintiff never filed a response. Accordingly, on January 5, 2009, Judge Schroeder filed a Report and Recommendation, in which he recommends that Defendants' Motion to Dismiss for Lack of Prosecution be granted with prejudice due to Plaintiff's failure to appear for scheduled conferences, failure to keep the court apprised of his current address, and failure to respond to Defendants' motion.

3. No objections to Judge Schroeder's Report and Recommendation were received from either party within ten days of the date of its service, in accordance with 28 U.S.C. § 636(b)(1)(C) and Local Rule 72.3(a)(3). This Court has carefully reviewed the Report and Recommendation, as well as the pleadings and materials submitted by the parties, and will accept Judge Schroeder's recommendations.

4. This Court notes that the Report and Recommendation does not resolve two Motions to Extend Time filed after Judge Schroeder set October 20, 2008, as the deadline for Plaintiff's response to Defendants' motion. The first of these motions, which was filed on September 11, 2008, and sought an extension of 30 days, was essentially mooted by Judge Schroeder's Order, filed the previous day, extending Plaintiff's time to respond to October 20, 2008. (Docket Nos. 97, 98.) The second motion, entered on the docket on October 23, 2008, sought a 3-week extension of time, which, if granted, would have extended Plaintiff's deadline to November 13, 2008. Although this motion was not resolved, Plaintiff did not file a response by November 13, 2008, and to this date has not filed a response to Defendants' motion as directed. Consequently, this Court finds that the unresolved motions do not preclude resolution of Defendants' Motion to Dismiss for Lack of Prosecution.

5. This Court further notes that the copy of Judge Schroeder's Report and Recommendation sent to Plaintiff at his last known address was returned as undeliverable. If Plaintiff has been released from custody or otherwise changed his address, he has not provided the court with an updated current address as required by the Local Rules. See Local Rule 5.2 (d) (requiring pro se litigant to furnish the court with a current address at which papers may be served and to update the address in writing). By operation of the

Local Rules, it is presumed that Plaintiff received the Report and Recommendation. See Local Rule 5.2(d) (papers sent to a pro se litigant's last known address are assumed to have been received by the litigant).

IT HEREBY IS ORDERED, that this Court accepts Judge Schroeder's Report and Recommendation (Docket No. 100) in its entirety, including the authorities cited and the reasons given therein.

FURTHER, that Plaintiff's Motions for Extension of Time (Docket No. 98 and 99) are DENIED as moot.

FURTHER, that Defendants' Motion to Dismiss for Lack of Prosecution (Docket No. 87) is GRANTED consistent with Judge Schroeder's Report and Recommendation.

FURTHER, that this case is DISMISSED with prejudice.

FURTHER, that the Clerk of the Court is directed to close this case.

SO ORDERED.

Dated: February 3, 2009
Buffalo, New York

/s/William M. Skretny
WILLIAM M. SKRETNY
United States District Judge